STATE OF MICHIGAN
SUPREME COURT
* * * * *

JAMES O. GORE AND BOBBIE N. GORE,

Plaintiffs-Appellees,

v

FLAGSTAR BANK, FSB,

Defendant-Appellant

SUPREME COURT
#. 127669

COURT OF APPEALS
#: 248919

LOWER COURT
#: 01-034913 CK

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JAMES J. VLASIC (P29485)
SOMMERS, SCHWARTZ, SILVER &
SCHWARTZ, P.C.
Attorney for Plaintiffs-Appellees
2000 Town Center, Ste. 900
Southfield, MI 48075-1100
(248) 355-0300

Mark W. Hafeli (P28908)
BEIER HOWLETT, P.C.
Attorney for Defendant-Appellant
200 E. Long Lake Road, Ste. 110
Bloomfield Hills, MI 48304
(248) 645-9400

/

127669

APPELLANT, FLAGSTAR BANK, FSB'S, REPLY BRIEF IN SUPPORT OF ITS APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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STATEMENT IDENTIFYING JUDGMENT APPEALED FROM AND STATING RELIEF SOUGHT

The Defendant-Appellant, Flagstar Bank, by and through its attorney, requests that the Court grant its Application for Leave to Appeal from a decision of the Court of Appeals dated November 7, 2004, reverse the decision of the Court of Appeals and reinstate the Judgment Notwithstanding the Verdict entered by Oakland County Circuit Court Judge Michael Warren.

The Supreme Court has proper jurisdiction because the decision of the Court of Appeals was dated November 9, 2004 and Appellant filed its Application for Leave to Appeal within forty-two days from the entry of that Order on December 21, 2004. MCR 7.302(C).

QUESTIONS PRESENTED FOR REVIEW RELATED TO FACTS OF THE CASE

THE DECISIONS OF THE TRIAL COURT AND OF THE COURT OF APPEALS PRESENT THE FOLLOWING ISSUES:

I. DID THE COURT OF APPEALS ERR IN DETERMINING THAT THE JURY, AND NOT THE TRIAL JUDGE, SHOULD DETERMINE WHETHER APPELLEES' PROMISSORY ESTOPPEL CLAIM SHOULD GO FORWARD AND DID THE COURT'S DECISION CONFLICT WITH BINDING SUPREME COURT PRECEDENT?

THE COURT OF APPEALS STATES: NO

APPELLANT STATES: YES.

APPELLEE STATES: NO.

II. IS THE DECISION OF THE COURT OF APPEALS THAT APPELLEES' PROMISSORY ESTOPPEL CLAIM, WHICH WAS BASED ON AN ORAL PROMISE, DID NOT VIOLATE THE STATUE OF FRAUDS CLEARLY ERRONEOUS AND IN CONFLICT WITH BINDING DECISIONS OF THE COURT OF APPEALS?

THE COURT OF APPEALS STATES: NO.

APPELLANT STATES: YES.

APPELLEE STATES: NO.

III. DID THE COURT OF APPEALS COMMIT REVERSIBLE ERROR IN FAILING TO FOLLOW MICHIGAN PRECEDENT WHICH HOLDS THAT A PROMISSORY ESTOPPEL CLAIM CANNOT BE BASED ON A CONDITIONAL PROMISE, ESPECIALLY WHEN THE CONDITION DID NOT TAKE PLACE?

THE COURT OF APPEALS STATES: NO.

APPELLANT STATES: YES.

APPELLEE STATES: NO.

IV. DO THE ISSUES IN THIS APPEAL INVOLVE LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE?

THE COURT OF APPEALS DID NOT ANSWER THE QUESTION.

APPELLANT STATES: YES.

APPELLEE STATES: NO.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant-Appellant, Flagstar Bank, has filed an Application for Leave to Appeal a decision of the Michigan Court of Appeals in this matter. The Appellees have filed a Brief in Opposition to the Appellant's Application for Leave to Appeal.

Pursuant to the provisions of the Michigan Court Rules, Appellant is filing this Reply Brief to challenge some of the points raised in the Appellees' Brief. The Appellant will rely on the Statement of Material Proceedings and Facts contained in its Application for Leave to Appeal.

I. JUDGE WARREN CORRECTLY RULED THAT THE JUDGE, AND NOT THE JURY, SHOULD DETERMINE WHETHER THE APPELLEES' PROMISSORY ESTOPPEL CLAIM SHOULD GO FORWARD IN LIGHT OF THE FACT THAT THERE WAS A BINDING CONTRACT ENTERED INTO BETWEEN THE PARTIES.

The Appellees attempt to argue in their Brief that Judge Warren relied on the jury verdict in determining that the promissory estoppel claim should not have been submitted to the jury. The Appellees argument is incorrect. Judge Warren relied on all of the case law contained in his Opinion which conclusively stated that where there is a binding contract between the parties a promissory estoppel claim should not be submitted to the jury.

Judge Warren framed the issue as follows:

> "At issue is whether allowing the jury to consider the alternative theories of breach of contract and promissory estoppel was in error in the instant case."

(See Opinion attached as **Exhibit 1**, pg. 9)

In his Opinion, Judge Warren stated:

> ". . . Thus, both parties agreed that a written instrument governed the issue. . . As such, permitting the jury to consider the doctrine of promissory estoppel as a grounds for recovery in addition to the breach of contract claim was error. . ."

(See Opinion attached as **Exhibit 1**, pg. 10-11)

Under the above language, it is clear what the jury did in this case was irrelevant with regard to the promissory estoppel claim. The claim should never have been submitted to the jury because, as Judge Warren stated, ". . . permitting the jury to consider the doctrine of promissory estoppel as a grounds for recovery in addition to the contract claim was error . . . "

In Corbin on Contract, Formation of Contracts, Vol II, § 8.12 p. 133, the commentator sets forth the test for whether a promissory estoppel instruction should be given as follows:

> ". . . Because promissory estoppel in Michigan is a substitute for consideration, when the same performance satisfies both detrimental reliance for promissory

estoppel and consideration for a written contract, promissory estoppel is not applicable. . . "

Judge Warren applied the Corbin test in determining whether a promissory estoppel instruction should be given and stated as follows:

"7. . . . the case at bar unequivocably has a written agreement, the performance of which also constitutes the claims of promissory estoppel. . . " (Footnote 7, p. 13)

Based on the Corbin test, Judge Warren decided that the doctrine of promissory estoppel was not applicable and an instruction of promissory estoppel should not have been given.

In his Opinion granting Judgment Notwithstanding the Verdict, (**Exhibit 1**) Judge Warren also made the following statements:

"Because allowing the jury to consider the doctrine of promissory estoppel was error, the Defendant's motion for relief should be granted. . . " (p. 15)

"8. . . Moreover, the Legislature's policy decision to preserve the integrity of written contracts and agreements in the financial services industry appears to be well-grounded – the case in bar is just one example of how financial institutions may be subjected to extensive litigation even when the terms of the agreement at issue clearly eschew any liability on the part of the institution." (Footnote 8, p. 15)"

Judge Warren also stated:

"As noted, *supra*, promissory estoppel "substitutes for consideration in a case where there are no mutual promises" – in the instant case **there were mutual promises** contained in the March 24 Commitment Letter, which promises satisfy the Statute of Frauds, but which were rejected as a cause of action by the jury. . . " (P. 13) (Emphasis added)

In summary, Judge Warren found that there was a contract between the parties in this case and therefore the promissory estoppel claim should never have been submitted to the Jury. Since the claim should never have been submitted to the jury in the first place, it is irrelevant what the jury said about the contract claim and the promissory estoppel claim.

In arriving at his determination, Judge Warren analyzed the issue for five pages in his Opinion and relied on all the applicable case law in determining that the promissory estoppel claim should not have been submitted to the jury.

Judge Warren did mention in his Opinion that the jury determined that the March 24th commitment letter constituted a written commitment in writing, which was signed with an authorized signature by the Bank. However, from reviewing the Opinion, it is clear that the Judge relied on the case law in determining that the claim should not have been submitted to the jury, and not the jury determination.

However, even if Judge Warren had relied on the jury determination (which he clearly did not) that the March 24th commitment letter constituted a written commitment in writing, it is clear that Judge Warren's ruling that the promissory estoppel claim should not have been submitted to the jury was correct. Judge Warren correctly ruled that since there was a valid contract, the promissory estoppel claim should not have been submitted to the jury, and it doesn't really matter what rationale was used to arrive at this determination because the determination was correct.

II. THE APPELLEES CLAIM THAT THEY BASED THEIR PROMISSORY ESTOPPEL THEORY ON THE WRITTEN CONDITIONAL COMMITMENT CONTRACT WHILE THE COURT OF APPEALS STATED THAT THE APPELLEES' PROMISSORY ESTOPPEL CLAIM WAS BASED ON AN ORAL REPRESENTATION MADE BY THE BANK'S LOAN OFFICER.

The Appellees' second point heading contained in their Brief reads as follows:

"II. THE COURT OF APPEALS ACCURATELY OBSERVED THAT THE JURY FOUND PLAINTIFFS' PROMISSORY ESTOPPEL CLAIM TO BE BASED ON A COMMITMENT IN WRITING WITH AN AUTHORIZED SIGNATURE BY DEFENDANT."

From the above statement, it appears clear that the Appellees are now claiming that they are basing their promissory estoppel claim on the written conditional commitment contract. (See attached **Exhibit 2**, Trial Exh.24/35).

If the Appellees' promissory estoppel claim was based on the written commitment letter, it would have to be dismissed under the authority of *First Security v. Aitken,* 226 Mich App 291 (1997), and *Bivans Corp. v. Community Nat'l Bank*, 15 Mich App 178 (1968), both of which hold that a promissory estoppel claim cannot be based on a conditional promise, especially when the condition did not take place.

The Court of Appeals, however, did not base its promissory estoppel analysis on the written conditional commitment contract. Rather, the Court based its promissory estoppel analysis on the loan officer, Paul O'Connell's, (TR., Vol II, 43, 65, 90) alleged oral statements that the property was eligible for financing, notwithstanding that it was in foreclosure, was a working farm, and consisted of more than fifty-three acres. The Court of Appeals Opinion reads as follows:

> ". . . Although the evidence indicated that plaintiffs' loan application was conditionally approved, **the promise underlying plaintiffs' promissory estoppel theory was not conditional. Plaintiffs presented evidence that they were unconditionally assured that their property was eligible for financing,** notwithstanding that it was in foreclosure, was a working farm, and consisted of more than fifty-thee acres. . ." (Emphasis added)

(See attached **Exhibit 3** Opinion, pg 4)

Under the Court of Appeals analysis, the Appellees' case would have to be dismissed since it is a promissory estoppel case based on an oral promise, which is barred under the Statute of Frauds, MCL §566.132.

In its Opinion the Circuit Court stated:

". . . In fact, the evidence at trial, accepted by the jury, was that (1) the Defendant financial institution made specific **oral representations** that the conditions of the Commitment Letter had either been met or were waived, (2) the Plaintiffs relied on such representations, which resulted in the Plaintiffs failing to pursue alternative financing, (3) despite its representations, the Defendant failed to make (sic) fund the loan commitment, and (4) the Plaintiffs lost their home to another financial institution because of the Defendant's actions. . . " (Emphasis added)

From the above statement, it is clear that the Circuit Court found that any statements that the conditions were met or were waived were oral.

Under either the Appellees' analysis or the Court of Appeals' analysis, the Appellees promissory estoppel claim would have to be dismissed. If the Appellees' analysis was used, then the promissory estoppel claim would be based on a conditional contract, which is not allowable under the authority of *First Security, supra* and *Bivans, supra.*

If the Court of Appeals' analysis was used, the promissory estoppel claim would have to be dismissed since it was based on an oral statement allegedly made by Flagstar's loan officer, which is not allowable under the Statute of Frauds, MCL §566.132 and the case of *Crown Technology v. D&N Bank, FSB,* 242 Mich App 538 (2000).

III. UNDER MICHIGAN LAW A CONDITIONAL CONTRACT IS A VALID CONTRACT AND IN THIS CASE THE APPELLEES DID NOT MEET ANY OF THE CONDITIONS FOR OBTAINING A LOAN.

On page 12 of Appellees' Brief, they attempt to argue that a conditional contract is not a valid contract under Michigan law. This argument is not supported by Michigan case law.

In *Knox v. Knox*, 337 Mich 109 (1953), the Michigan Supreme Court stated:

"While parties to a contract may by specific provision, or by necessary implication, make performance by one party a condition precedent to liability on the part of the other. . . "

Under the above language it is clear that a contract may contain conditions and the fact that it does contain conditions does not means that it is not a contract.

In *Knox, supra* the Court cited another case and stated:

> ". . . Whether a provision in a contract is a condition the nonfulfillment of which excuses performance depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances when they executed the contract. . . "

Under the above language cited by the Supreme Court, it is clear that the contract may contain conditional provisions. In this case, the commitment letter was a conditional contract which clearly set forth the conditions which needed to be met before a loan could be made.

The Appellees then attempt to argue that the Court of Appeals found that the conditions had been fulfilled. However, the Court of Appeals made no such ruling.

In its Opinion on page 4, (See **Exhibit 3**) the Court of Appeals stated the following:

> "We disagree with defendant's contention that the trial court's decision may be upheld because plaintiffs could not establish promissory estoppel for the reason that any promise made by it was conditional only. Although the evidence indicated that plaintiffs' loan application was conditionally approved, **the promise underlying plaintiffs' promissory estoppel theory was not conditional. Plaintiffs presented evidence that they were unconditionally assured that their property was eligible for financing**, notwithstanding that it was in foreclosure, was a working farm, and consisted of more than fifty-three acres. **Plaintiffs relied on this promise** to their detriment by proceeding with the loan application process, obtaining an extension of the redemption period, and foregoing alternative sources of financing. . . " (Emphasis added)

From the above statement, it is clear that the Court of Appeals felt that the Plaintiffs' promissory estoppel theory was not conditional because the conditions had orally been waived and not because the conditions were met. However, as mentioned above, the oral statements of waiver are barred by the Statute of Frauds.

Appellees' argument that all of the conditions were met is clearly not correct because condition no. 4, the appraisal requirement, was not met since the collateral was a working farm and it was larger than ten acres.

In addition, conditions 5 and 6 were not met. Those conditions read as follows:

"(5) DOC. MTG CURRENT AT TIME OF APPLICATION; IF NOT, MUST REDUCE PORT LEVEL TO PORT 4, LTV MAY
(6). . . BE LOWERED & CANNOT HAVE CASH OUT. (& CANNOT BE MORE THAN 89 DAYS PAST DUE)"

All of the testimony at the trial was that conditions 5 and 6 were not met. The testimony was that the First National Bank of Howell Mortgage was not current at the time of application, but in fact was approximately three months delinquent. More importantly, the NBD mortgage was not current at the time of application and was also more than 89 days past due. The NBD mortgage had gone into foreclosure and was 10 months into the redemption period at the time that the loan was applied for. Therefore, the debt was obviously more than 89 days past due.

Paul O'Connell testified that conditions 5 and 6 were not met. Tina Cowen testified that conditions 5 and 6 were not met. More importantly, Appellee, James Gore testified on cross-examination that conditions 5 and 6 were not met.

In summary, the conditional commitment letter was a binding contract in this case and an objective review of the conditions contained in the contract showed that they clearly were not met.

IV. THE ISSUES IN THIS APPEAL INVOLVE LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE.

The Court of Appeals decision in this case failed to follow binding precedent in the area of contract law, promissory estoppel, and the Statute of Frauds, MCL §566.132.

To begin with, the Court of Appeals held in this case that an oral promise to lend money was enforceable notwithstanding the express provisions of the Statute of Frauds, which requires a writing. The Court of Appeals' decision conflicts with *Crown Technology v. D&N Bank, FSB, supra*, which holds that for the purposes of the Promissory Estoppel Doctrine, a promise to loan money must be in writing in order to be enforceable.

The Court of Appeals also held that the question of whether there is a promissory estoppel claim should originally be decided by the jury and not by the Court. This ruling was in direct conflict with prior Michigan authority including *State Bank of Standish v. Curry*, 442 Mich 76, (1993), which holds that the Court must make the original determination.

The Court of Appeals also erroneously ruled that a promissory estoppel claim could be submitted to the jury even though the trial court found as a matter of law that a written contract governed the issues. This ruling is in conflict with a number of Michigan decisions.

As a result of the ruling of the Court of Appeals, the law in the areas of contract, promissory estoppel and the Statute of Frauds is in a state of tremendous confusion, if not chaos.

Under the Court of Appeals ruling a bank's right to enter into a loan agreement with a prospective customer has been thrown into a state of complete confusion. The Court of Appeals ruled that the bank's commitment contract is not controlling. Under the Court's ruling any bank customer could bring an action for promissory estoppel and have a jury determine whether the customer is entitled to damages. The conditions contained in the commitment letter could be ignored by the jury under the ruling of the Court of Appeals. As a result, the ruling of the Court of Appeals should open the gates for a new wave of promissory estoppel claims against banks based on the oral representations of loan officers.

These rulings will also be applicable in areas other than banking. Whenever an individual enters into a contract in any commercial setting, the individual can argue that oral representations were made by a company representative thereby obtaining a jury trial on a promissory estoppel claim. According to the Court of Appeals, under the promissory estoppel claim, any limitations or protections contained in the contract would be inadmissible and the Plaintiff would obtain a jury trial on the oral representations only.

Accordingly, the Court of Appeals ruling will result in an increase in trials and appeals. There will also be less incentive for Plaintiffs to settle their contract claims since under the Court of Appeals ruling they are now given two chances to prevail. Since it is not uncommon for a Plaintiff in a breach of contract case to add a claim of promissory estoppel, the increase in litigation could be significant.

This case presents an excellent opportunity for the Supreme Court to clear up the confusion caused by the Court of Appeals Opinion. If the Supreme Court were to rule that under the Statute of Frauds a promise to loan money must be in writing, then the confusion in that area would be cleared up and the precedent of *Crown Technology v. D&N Bank, FSB, supra* would be followed.

If the Court were to rule that the Court, and not the jury, decides whether a promissory estoppel claim should go forward, then the confusion in the promissory estoppel area would be cleared up and binding precedent would be followed.

If the Supreme Court were to rule that where there is a contract entered into between the parties, there is no claim for promissory estoppel, then that area of the law would be cleared up and binding precedent would be followed.

For all of the above reasons, Flagstar Bank respectfully requests that this Honorable Court grant leave to appeal and affirm the decision of Judge Warren granting Flagstar's Motion for Judgment Notwithstanding the Verdict.

Respectfully submitted,

BEIER HOWLETT, P.C.

By: _____
Mark W. Hafeli (P28908)
Attorney for Defendant, Appellant

Dated: February 1, 2005.